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IN THE

Supreme Court of the United States

October Term, 1970

No. 367

LYKES BROS. STEAMSHIP CO., INC.,
Petitioner,

versus

HESS SHIPPING CORPORATION,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

MAY IT PLEASE THE COURT:

Comes now Hess Shipping Corporation, Respondent, and respectfully submits its brief in opposition to Petitioner's application for writ of certiorari seeking review of the decision and judgment of the United States Court of Appeals for the Fifth Circuit which affirmed the decision and judgment rendered by the United States District Court for the Southern District of Alabama.

(a) OPINIONS BELOW

(1) On May 28, 1968, Chief Judge Thomas of United States District Court for the Southern District of Alabama sitting in Admiralty without a jury rendered a decision holding Petitioner liable for damages resulting from a ship collision between Petitioner's SS CHARLES LYKES and Respondents ST .HESS VOYAGER, which decision is reported at 285 F. Supp 412.

(2) On October 10, 1969 a three judge panel, composed of Chief Judge Brown, Circuit Judge Godbold and District Judge Cabot (sitting by designation pursuant to 28 U.S.C.A. 291 and, therefore, empowered with the full authority as a Circuit Judge under the provisions of 28 U.S.C.A. 296), rendered its decision affirming this opinion reported at 417 F. 2d 346. The decision was authored by District Judge Ted Cabot with Judge Godbold concurring and Chief Judge Brown dissenting.

(3) Petitioner's statement that the Court of Appeals sitting *en banc* was evenly divided is true, as far as it goes. The fact is that Judge Cabot, of the United States District Court for the Southern District of Florida, sat by designation at the original hearing in the Court of Appeals and authored the majority opinion. Judge Cabot was not permitted to participate in the en banc rehearing but it stands to reason that the Court would not have been evenly divided had he been allowed to participate.

(b) JURISDICTIONAL GROUNDS

The Respondent is satisfied with the Petitioner's statements regarding jurisdiction of this Court.

(c) QUESTIONS PRESENTED FOR REVIEW

The questions presented for review are not those set forth by the Petitioner for the following reasons:

(i) The controlling question is whether in this maritime ship collision case the District Court was "clearly erroneous" in exonerating the ST HESS VOYAGER and holding it to be free of contributing fault in the collision which is the subject of this petition.

(ii) There is no direct conflict between the judgment of the Fifth Circuit Court of Appeals here and that of the Court of Appeals for the Second Circuit in the GOLDSHELL-WHITE PLAINS' decision, 224 F. 2d 86, 1955 AMC 1438. The factual situation differs so completely in the two cases that neither should be used as a precedent for the other. These differences will be detailed in the ensuing argument.

(iii) There is no conflict between the judgment of the Fifth Circuit here and that of the Court of Appeals for the Second Circuit in the BURGAN-BERGECHIEF, 274 F.2d 469, 1960 AMC 1380. Here again, the facts in the two cases are essentially different. These differences will be detailed in the ensuing argument.

(iiii) Respondent knows of no reason why this Court should be called upon to make guidelines for naviga-

tors. The United States Coast Guard is the agency responsible for making guidelines under the Rules and for punishing violators thereof.[1] The Rules themselves were deliberately couched in flexible language so that they could be logically applied according to the existing circumstances of each particular case. That is the reason that Rule 27, 33 USC 212, was given the same force of statute as the main body of the Inland Rules.

STATUTES AND REGULATIONS INVOLVED

It is the Respondent's position that the statutes and regulations involved in the matter are as follows:

(a) Inland Rules, Article 16, June 7, 1897, C. 4, Section 1, 30 Stat. 99, 33 USC 192.

> "Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions. A steam vessel fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

(b) Inland Rules, Article 25, June 7, 1897, 33 USC 210.

> "In narrow channels every steam vessel shall, when it is safe and practicable, keep to that

[1] Gilmore and Black, The Law of Admiralty, P. 781; 46 U.S.C. 239

side of the fairway or mid-channel which lies on the starboard side of such vessel."

(c) Rule 52(a) Federal Rules of Civil Procedure

"* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses * * *"

STATEMENT OF THE CASE

Petitioner's version of the facts in this case is so incomplete and in variation with the findings of both the District Court and the Court of Appeals that Respondent is compelled to submit what it believes to be an accurate statement of the case fully supported by the record and the decisions of the District Court and the Court of Appeals.

This collision, and the material events preceding it, occurred in the extremely narrow, dredged channel in the shallow waters of Mobile Bay. The Channel is a 400 foot wide ditch, 40 feet in depth, and it runs from the Gulf of Mexico through the shallow waters of Mobile Bay to the City of Mobile, a distance of approximately 35 miles. The physical characteristics of this Channel are shown on U. S. Coast & Geodetic Survey Chart No. 1266, the relevant portion of which was a trial exhibit and it is included as an annex at the end of this brief.

The navigation of both vessels was being controlled by Mobile Bar Pilots operating under licenses issued

by the U. S. Coast Guard. Each vessel's master, also licensed by the U. S. Coast Guard, was on the bridge with the pilot at all relevant times. All members of the Mobile Bar Pilot's Association are equipped with high powered walkie talkie radio sets which they have with them at all times while piloting vessels in and out of the Port of Mobile. These walkie talkie radio sets enable the pilots on duty to remain in constant communication with each other for the purpose of exchanging information relating to the navigation of their own vessel, other vessels within their immediate vicinity, the weather and tide conditions and any other special circumstances coming to their attention. The pilots of the two vessels here involved were in communication with each other *prior to and during the entire time the Charles Lykes was underway.*

The collision occurred at Buoy No. 42, located on the east side of the Upper Reach of the Mobile Ship Channel, at approximately 10:10 P.M., March 3, 1966. The outbound Charles Lykes was proceeding southwardly for the Gulf in route to Pascagoula, Mississippi, only a short distance from Mobile. Her booms and related cargo handling equipment had been left in an upright position to expedite loading on arrival at Pascagoula. The inbound Hess Voyager was proceeding from sea, northwardly, for the Port of Mobile. The Charles Lykes was partially ladened with cargo. The Hess Voyager had no cargo of any kind, her tanks having nothing in them but salt water ballast. Both vessels are registered and licensed under the laws of the United States.

The Charles Lykes is a relatively small cargo vessel, being 444 feet long and 63 feet wide, with a gross tonnage of 8,178 tons. She was built on the west coast of the United States in 1944.[2]

The Hess Voyager, although considerably smaller than the modern "super tanker" was large in comparison to the Charles Lykes. The Hess Voyager is 708 feet long with a width of 102 feet and gross tonnage of 27,015 tons.[3] Modern "super tankers" range from 50,000 to 200,000 tons.

The Upper Reach of Mobile Ship Channel runs almost due north and south (the coordinates being 002° for inbound vessels and 182° for outbound vessels.[4]

The relevant portions of the chart from Buoy No. 40 to the inner harbor in Mobile River (Pinto Island Reach) is reproduced as an annex hereto, as mentioned above.

Referring to the annex, it will be seen that the buoys and beacons marking the channel are numbered in ascending order from north to south.

The Mobile Ship Channel is a dredged cut maintained by the U. S. Corps of Engineers with a bottom width of 400 feet and a project depth of 40 feet.[5]

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[2]Hess Exhibit #1
[3]Hess Exhibit #2
[4]Hess Exhibit #3, U. S. Coast and Geodetic Survey Chart #1266
[5]Hess Exhibit #19

The relevant aids to navigation in the Upper Reach in the vicinity of the collision (Buoys No. 42 and No. 44) are located 150 feet outside and to the east of the 40 foot bottom width of the Channel.[6]

From the bottom, the dredged cut of the Channel's banks "slope" or "taper" upwardly and outwardly so that with a light draft vessel with a draft of as much as 22 feet a ship can pass very close to the markers and "almost rub them".

Both vessels were light at the time of collision and the Hess Voyager was drawing 22.03 feet aft and 10.09 feet forward, and the Charles Lykes was drawing 6 feet forward and 16.10 feet aft.

Referring again to the chart reproduced as an annex hereto, it will be observed that Buoy No. 44 marks the mouth of the Mobile River (which is shown on the chart as Pinto Island Reach), with everything below No. 44 being Mobile Ship Channel in Mobile Bay.

In the vicinity in question, Mobile Bay is very shallow and is not navigable outside the markers, and there are no anchorages between the outer bar at the mouth of Mobile Bay and the harbor itself in Mobile River, with the exception of one small "pocket" on the eastern side of the Channel in the vicinity of Beacon 38. A small vessel without radar was anchored in this "pocket".

On the night in question, the wind was from the

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[6]Hess Exhibit #19; App 154

southwest at 8 to 12 miles per hour.[7] At the time of collision, there was patchy fog with visibility restricted in ratio to density of fog. The tide was ebbing[8] at one and a half knots.

The Charles Lykes was sounding fog signals as she approached the point of collision, but with the wind from the southwest, none were heard by the Hess Voyager.[9] The Hess Voyager was also sounding fog signals, some of which were heard by the Charles Lykes.

The collision occurred on the extreme east side of the Channel at 2210 hours just as the Hess Voyager grounded from No. 3 tank forward on the extremity of the Channel's east bank with her starboard quarter 50 to 60 feet off Beacon No. 42 and with her bow heading northeasterly at 019°.[10] The Hess Voyager was so far out of the Channel that the tug that came to pull her free also went aground.[11]

The Charles Lykes, after striking the Hess Voyager, dropped her anchors, running out four full shots of chain and swung on her anchor chain from a southerly heading, back around to a northwesterly heading of 331 1/2 degrees.[12] Despite her length of 444 feet, the Charles Lykes did not go aground,[13] but anchored in the dredged Channel.

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[7]Hess Exhibit #4 and 5
[8]App 186
[9]App 239; Sup App 131, 140
[10]App 184, 198, 100, 117, 118, 132, 143; Sup App 130
[11]District Court's Findings of Fact
[12]App 74; Sup App 35
[13]App 74, 113

The Bell Book of the Charles Lykes shows that she logged Buoy 44 at the mouth of the River at 2205 and collision at 2210.[14] In this five minute period, she covered the chartered distance of .875 nautical miles. Thus, in the approach to the point of collision, the Charles Lykes made good a speed of 10.5 knots over the ground.

The erratic behavior of the Charles Lykes was explained by those in charge of her navigation as resulting from the fact that her cargo booms had been left in the upright position[15] so that the scanner, located below the tops of her booms on top of the starboard side of the bridge,[16] would not pick up targets ahead and to the east side of the Channel (to the left of the Charles Lykes) such a crucial Buoy No. 44[17] and Buoy No. 42,[18] and even the Hess Voyager itself because of what her master described as "that boom clutter".[19]

The fog thickened as the Charles Lykes approached Buoy No. 44 in anticipation of making the 28 degree course change to her right (from 154° to 182°) and the Charles Lykes' radar failed to pick up Buoy No. 44. This caused her pilot to proceed beyond the point where he normally would have changed course.[20] As a result of this delay, when he did change his course to 182°, he was well over on the eastern side of the

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[14]Hess Exhibit #15
[15]App 57, 58
[16]Hess Exhibit #13A
[17]Sup App 91
[18]App 56; Sup App 115
[19]App 85
[20]Sup App 91

Channel. From this point on, the Charles Lykes never recovered her proper position in the Channel, i.e. her own starboard side (west half of the Channel). She continued down the east side of the Channel in spite of having been notified by the Hess Voyager that she needed to move over to her starboard, and worse still, informing the Hess Voyager by voice radio that she was in the process of moving over. The Charles Lykes' pilot was unable to accept the fact that he was out of position and was in danger of collision with the Hess Voyager. He mistakenly assumed that the Hess Voyager had not come within the range scale setting of his radar and since his radar was picking up objects off his starboard bow, he mistakenly assumed that it would pick up the Hess Voyager when the latter came into range. In his own words, he was "reassured"[21] that his navigation was not leading him into danger of collision with the Hess Voyager. This persistence in pursuing a course on the eastern side of the Channel caused the District Court to make an official finding of fact that "the Charles Lykes would have collided with her (Hess Voyager) even if she had been dead in the water."

The Hess Voyager during the entire time the Charles Lykes was underway at slow ahead, hugging the east bank, stemming the current with her radar functioning properly, [illegible] repeated [illegible] tions from the Charles Lykes that the latter was in the process of moving over to her own starboard side of the Channel. The Hess Voyager did the only thing she could do to avoid the collision — she ran completely out of the Channel until she grounded but she

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[21] App 260, 261

was nevertheless struck by the Charles Lykes as she ran aground. It will be recalled that the channel banks are tapered outward and upward; that the Hess Voyager was drawing ten feet forward and twenty two feet aft (a mean draft of sixteen feet); that the vessel was hard aground at No. 3 tank at the moment of collision. It is apparent that the Hess Voyager was completely out of the channel even before the vessels were visually sighted.

(f) BASIS FOR FEDERAL JURISDICTION

Respondent is satisfied with Petitioner's statement of jurisdiction.

(g) REASONS FOR NOT ALLOWING THE WRIT

Petitioner's attempted condemnation of the Hess Voyager because she is a tanker type vessel is inappropriate to say the least. The only cargo aboard the vessel was salt water. Reference to other unrelated casualties involving petroleum carrying vessels is so manifestly improper that Respondent will not dwell upon them.

Petitioner next quotes from the dissenting opinion of Judge Brown. Judge Brown is apparently alarmed that this case will be construed as an abandonment by the Fifth Circuit of the so called 'rule of sight' doctrine and of the requirement of Article 16 to 'stop engines'. Such is not the case. The trial court and the majority opinion both held *that under the existing circumstances* the Voyager's speed was moderate; that the stopping of engines was not required by the

rule because the position of the Charles Lykes was known and further, that the stopping of the Voyager's engines *under existing circumstances* would probably have thrown her out of control thereby creating a more dangerous situation than would otherwise have existed. The attendant circumstances, the safety of other vessels in the immediate vicinity, as well as the safety of the Hess Voyager itself, fully justified these findings and conclusions. In addition to these findings and conclusions, the Court specifically found that "The Charles Lykes would have collided with her (the Voyager) even if she had been dead in the water.".

1. SPEED OF THE HESS VOYAGER WAS MODERATE AND WAS NOT A CAUSE OF COLLISION

Petitioner states on page 9 of its brief that the court held the HESS VOYAGER's speed to have been moderate because of the "great size of the vessel," which "... seriously impaired the pilot's ability to control the vessel".

What the court actually held was that based on all the facts the speed of the HESS VOYAGER was moderate and prudent, and that, among other things reduction of speed and loss of steerageway would probably have resulted in a more serious collision.

The record clearly shows that the HESS VOYAGER had reduced speed to Slow Ahead during the entire time the Charles Lykes was underway.

Under Article 16 of the INLAND Rules, "moderate speed is a purely relative term which means no more

than the vessel must run at prudent rate of speed, time, place and circumstance rather than swiftness over the course determine whether the actual speed was immoderate in that it was imprudent". *Quinette vs. Bisso*, 136 F. 825 (5th Cir. 1905); to the same effect see the *James A. Carney*, 192 F. 216 (S.D. Ala. 1911), aff'd. 203 F. 975 (5th Cir. 1913); or, as the Second Circuit expresses it, "moderate speed is less than full speed, but the term is a relative one and precisely how much less *depends on the peculiar circumstances of each case.*" *Polarus S.S. Co. vs. The T. S. SANDJEFJORD*, 236 F. 2d 270 (2d Cir. 1956), cert. den., 352 U.S. 92, 1 L.ed 2d 365.

Moderate speed under Article 16 is rather "vague" and it cannot be applied "mechanically" or with "certainty" as Petitioner seeks here to do, because the speed chosen must be done with due regard to the actual factors producing danger — such as "traffic to be anticipated". *The Law of Admiralty*, Gilmore and Black, page 416. Likewise, it has been held that the rule of moderate speed "is not a universal one to be applied blindly", *Gertrude Parker, Inc. vs. Abrams*, 178 F.2d 259 (1st Cir. 1949).

Having shown that "moderate speed" under the rules is a relative term, varying according to the circumstance in each case, in both the Second Circuit and the Fifth Circuit, the inquiry next is whether the question of speed is one of fact. In *China Union Lines, Ltd. vs. A. O. Andersen*, 364 F. 2d 769 (5th Cir. 1956), a ship collision case, the court squarely held:

"A prudent speed under the circumstances was an issue of fact for the judge. *Socony Vacuum Oil Co. vs. Smith*, 179 F. 2d 672 (5th Cir. 1950)."

In addition to holding that speed of the HESS VOYAGER was moderate, the trial court also held that her speed was not a contributing cause of the collision for the reasons that (1) the HESS VOYAGER was aground at the time of collision (2) that maintenance of headway probably avoided a more serious collision than would actually have otherwise occurred.

These findings of fact clearly are overwhelmingly supported by substantial evidence. The HESS VOYAGER had just completed a passage with the SS CLAIBORNE, a ship of the exact dimensions, size and construction as the CHARLES LYKES. It effected that passage with the CLAIBORNE at the same speed she would have made her passing with the CHARLES LYKES. The HESS VOYAGER was in radio contact with the CHARLES LYKES and was advised by the CHARLES LYKES that she was moving over to effect the intended port to port passage.

This is not a case in which the HESS VOYAGER was trying to ascertain the position of a vessel which it could not locate.[22] Neither is it a case where the HESS VOYAGER was in open water so that vessels could be expected from all angles of the compass.[23]

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[22] See United N.Y. Sandy Hook Pilots Assn. v. Den. Norske etc. 121 F 2d 304 (2d Cir 1941) holding position "ascertained" where movements were entitled to be "forecast".

[23] cf. *The Martello*, 153 U.S. 64, 38 L.ed 637 (1893)

On the contrary, the HESS VOYAGER knew that the CHARLES LYKES was located in the Mobile Ship Channel below buoy number 44, and she was told by the CHARLES LYKES that she was moving over for port to port passage — a movement to its right of only 100 to 150 feet which could be expected to cause no difficulty. However, the blocked-out radar of the CHARLES LYKES made this maneuver impossible because neither the Hess Voyager or the channel markers could be seen on radar.

The evidence is clear, convincing and undenied that had the HESS VOYAGER not maintained headway so as not to "fall off in the wind," loose headway and get "crossways of the channel", it would have made collision a certainty and probably resulted in a much more serious collision than the glancing blow which actually occurred.

The CHARLES LYKES did not make good its radio advices that it would regain its own side of the channel, but on the contrary, it remained out of position and collision resulted. The erratic behavior of the CHARLES LYKES was not to be foreseen or anticipated by those in charge of the navigation of the HESS VOYAGER. As this court has said in *The VICTORY and PLYMOTHIAN*, 168 U.S. 410, 42 L. ed. 519 (1897):

> "None of the excuses set out by the VICTORY for being on the wrong side of the channel tended to palliate her guilt ... each of these vessels was entitled to *presume* that the other would act lawfully; *would keep to her own side of the channel;* if temporarily crowded out of her

course *would return to it and that she would pursue the customary track of vessels in the channel*... We are of the opinion that the PLYMOTHIAN was on her own proper course; and that she *was not bound to anticipate* the conduct of the VICTORY; . . ." (Emphasis Supplied)

2. FAILURE OF THE HESS VOYAGER TO STOP ENGINES DID NOT CAUSE OR CONTRIBUTE TO THE COLLISION BUT ACTUALLY AVOIDED A MORE SERIOUS COLLISON

Corollary to the theory that the HESS VOYAGER should have further reduced its speed below Slow Ahead, Petitioner also argues that paragraph 2 of Article 16 required that the HESS VOYAGER, under the circumstances of the case, stop its engines prior to the collision.

Quite aside from the fact that the HESS VOYAGER did not hear any fog signals which the CHARLES LYKES claims it sounded, and quite aside from the fact that the HESS VOYAGER had put its engines astern prior to collision, and quite aside from the fact that the position of the CHARLES LYKES had been "ascertained" by both radio and radar,[24] and quite aside from the fact that the CHARLES LYKES had reported to the HESS VOYAGER that it was regaining its side of the channel preparatory to a port to port passage, and quite aside from the fact that the HESS

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[24]United N.Y. Sandy Hook Pilots Assn v Den Norswe etc. 121 F2d 304 (2d Cir. 1941)

VOYAGER was aground at the time of collision, it is very clear that any failure to stop engines was a mere technical violation which in no way caused the collision. On the contrary, it is equally clear that stopping of engines in these restricted waters, just as in the case of reduction of speed, would probably have caused a more serious collision under the circumstances of the case.

Under circumstances almost paralleling the case at bar the Fifth Circuit has held that where one vessel failed to maintain the starboard side of the Houston Ship Channel and the other vessel did not stop engines, the failure to stop engines was a non-contributive fault under Article 16 of the Inland Rules. *The Standella,* 108 F. 2d 619 (5th Cir. 1939). There, the court said:

> "From all the evidence it clearly appears that the collision occurred on the east side of the channel; that the M V Standella was negligently navigating on her port side of the channel; and that had she kept to the west (her starboard) side the collision would not have occurred.
>
> *The M V Standella was guilty of a most serious statutory fault when she navigated on the port side of the fairway or mid-channel.* Section 210, 33 Mason's U.S.C., provides: 'Steam vessel in narrow channel . . . *This is a cardinal rule of navigation and applies as well in fog as in clear weather.* The most ignorant navigator will be presumed to know this simple

and wise requirement. Yarmouth, 100 F. 667; Newport News, 105 F. 389, 393.

The M/V Standella claims fault against the Andrew for failing to stop her engine and cites Article 16, 33 Mason's U. S. C., Sec. 192 which provides: 'Speed in fog, etc...'

It is without dispute that the Andrew failed to stop or reverse her engines, and that at the time of the disaster she was moving at a speed of about two or two and one-half miles per hour. It is clearly shown, however, that the failure of the Andrew to stop or reverse her engine did not cause the accident. Her failure to stop in no wise contributed to the collision. The M/V Standella was moving out to sea on the wrong side of the channel. *Had the Andrew stopped her engines she would have been in the path of the oncoming M/V Standella and the collision would have in all probability been more serious than it was.* The liability for damages is upon the ship or ships whose fault caused the injury and where, as here, the fault of one vessel could have had nothing to do with the collision that fault may be dismissed from consideration. Pennsylvania, 86 U.S. 125, 136; Providence, 282 F. 658, 661. *The failure of the M/V Standella to comply with Article 25 was the sole cuse of the collision and she must answer in damages for the injuries sustained by the Andrew.* Vanderbilt, 73 U.S. 225, Providence, 282 F. 658; Pennsylvania, 86 U.S. 125. The judgment is affirmed." (Emphasis supplied)

It is submitted that the stopping of the HESS VOYAGER's engines could not have been a contributing fault under the circumstances of this case since under the undisputed evidence the stopping of engines would probably have caused a serious and dangerous collision. *The Providence*, 282 F. 658 (D.C. R.I., 1922); *The Coast Banker*, 120 F. 2d 395 (9th Cir. 1942); *Gertrude Parker, Inc. vs. Abrams*, 178 F.2d 259 (1st Cir. 1949).

Of similar import is the recent case of *Union Oil Company of California vs. Tugboat San Jacinto*, 304 F. Supp. 519, (U.S.D.C. Oregon — 1969). There, where one vessel cut across the channel and navigated on the wrong side of a narrow river channel in fog, the court, after showing the gross fault of the vessel which was navigating on the wrong side of the channel, found as a matter of "common sense and the overwhelming weight of evidence" that the vessel was guilty of gross fault for navigating on the wrong side of the channel and was solely at fault regardless of the fact that the opposing vessel had not stopped engines. In this connection the court held:

> "There is no doubt in my mind but that the SS Santa Maria 'ascertained' the position of the tug San Jacinto prior to and at the time of the Tug San Jacinto's fog signals. Consequently, the SS Santa Maria was justified in proceeding without stopping her engines. *This 'ascertainment' may be made by radar and is an adequate justification for failure to comply with the technical requirements that the engines be stopped. For that matter it probably would*

have been a lack of good judgment on the part of those in charge of the SS Santa Maria to stop their engines and loose steerageway in this very narrow channel. United States vs. Motor ship Hoyanger, 265 F. Supp. 730 (W.D. Wash., 1957); *Universal Insurance Co. vs. The Coast Banker*, 129 F.2d 395 (9th Cir. 1942). The decision in *China Union Lines, Ltd. vs. A. O. Anderson & Co.*, 364 F.2d 769 (5th Cir. 1966) is very persuasive on my decision on the facts in this case. Here, those in charge of the navigation of the SS Santa Maria had no reason to believe that the Defendants would have *cut across the bow of their ship. It is my view that any possible violation of Article 16 of the Inland Rules by the SS Santa Maria or those in charge of her navigation, were technical in nature and were not a contributing cause of the collision.* The law on this subject is clear ..." (Emphasis supplied).

and in *The Umbria*, 166 U.S. 404, 41 L.ed. 1053 (1896) this court held:

"It is probably also true that, considering the great speed of the Umbria, *it were better that the Iberia should keep her steerageway rather than stop her engines and reverse*, since she would respond to her wheel more readily if her engines were kept in motion and if her headway were not entirely stopped ... These rules are intended for the prevention of collisions and if it be apparent that the observance of a certain rule would not have prevented a collision in a

particular case, the non observance of such a rule becomes immaterial ..." (Emphasis supplied).

3. THE GROSS FAULT OF THE CHARLES LYKES WAS THE SOLE CAUSE OF COLLISION

It cannot be denied, and indeed it has not been attacked, that the CHARLES LYKES was grossly at fault. Without a doubt the petitioner has violated the "cardinal rule" of navigation in narrow channels by failing to maintain its own starboard side of the channel. *The Standella*, supra. It is submitted that this violation amounts to gross fault which was the sole and proximate cause of the subject collision. Under such circumstances this court in *Alexandre vs. Machan*, 147 U.S. 72, No. 37 L.ed. 84 (1892), held as follows:

> "In view of the recklessness which the steamer was navigated that evening, it is no more than just that the evidence of contributory negligence on the part of the sailing vessel should be clear and convincing. *Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel.* There is some presumption at least adverse to it claim in any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favor." (Emphasis supplied).

The rulings of the Fifth Circuit are in accord. *The Queenston Heights*, 220 F.2d 120 (5th Cir. 1955); *The Evelina*, 243 F.2d (5th Cir. 1957); *Ducol v. Mississippi River Bridge Authority*, 295 F. 2d 223 (5th Cir. 1968); *Moran Towing and Transportation Co. v. Empressa Hondurena de Vapores*, 194 F.2d 629 (5th Cir. 1952).

4. THE RULING OF THE TRIAL COURT AS AFFIRMED BY THE COURT OF APPEALS IS NOT CLEARLY ERRONEOUS

The petitioner is here actually seeking to rehash or retry the factual issues resolved against it. However, unless the findings of the trial court as affirmed by the court of appeals are clearly erroneous, so that the Court is convinced on the entire evidence and is "left with the definite and firm conviction that a mistake has been committed", the petition should not be granted. *McAllister vs. United States*, 348 U.S. 19, 99 L.ed. 20 (1954); Rule 52, F.R.C.P; *Alexandre vs. Machan*, supra. In applying the principal announced in *McAllister*, supra, the court, in *The Evelina*, supra, held that where gross fault of one ship was sufficient to account for the collision alleged violations of the other vessel would not be held to contribute. Said the court:

> *"Failure on the part of the Edward T to follow the rules there might have been, but the question is whether that fault was a contributing cause to the collision.* The record does not require such a finding. *The District Court found otherwise. We may not set aside the District Court's judgment unless it is clearly erroneous.*

McAllister vs. United States, 348 U.S. 19, 1954 A.M.C. 1999; see *J. Dick Towing Co. vs. Leo*, (5th Cir. 1953) ..." (Emphasis supplied).

See also *American Law of Collisions*, Griffin, pages 506-508.

In maritime collisions, findings of fact by the District Court relative to proximate cause and contributory negligence have uniformly been held to be questions of fact to be determined by the District Court. *Safe Harbor Enterprises, Inc. vs. Shrimp Trawler Hazel H.* 301 F.2d 139 (5th Cir. 1962); *A R Seljan and M/V Stolt Sildra vs. Pioneer Leasing Corp.*, 406 F.2d 768 (5th Cir. 1969); *in re Rapps Petition*, 255 F.2d 628 (7th Cir. 1958); *U.S. vs. Soriano*, 366 F.2d 699 (9th Cir. 1966).

The language of the Fifth Circuit in connection with another Mobile Ship Channel case should have application here. In *Moran Towing and Transportation Co. vs. Empressa Hondurena de Vapores*, supra, the Fifth Circuit in speaking of the trial court's ruling even before the advent of the *McAllister case*, supra, said:

> "In these circumstances, the proper, the only safe, course for this court to pursue, is, we think, not to seek to reconstruct the scene for ourselves, making our determination of fault as though we were the triers, but instead to adopt as our own the findings of the distinguished and lamented trial judge: Familiar as he was from a lifetime of residence, with the waters of Mobile Bay and with the navigaton thereon, and endowed by nature and experienced with a fine sense of rusticum jus fitting

cases of this kind where the matter may not be determined with precision, he brought to the hearing of this case, among the last tried by him, and to the study of the record made, a true and tried equipment."

5 THERE IS NO CONFLICT BETWEEN THE DECISIONS OF THE FIFTH CIRCUIT AND THOSE OF THE SECOND CIRCUIT

(a) The Goldshell-White Plains Decision is in harmony with the Decisions of the Fifth Circuit.

The petitioner contends at pages 9-10 of its brief that the decision of the Second Circuit in *Goldshell-White Plains*, 224 F.2d 86 (2d Cir. 1955) is in conflict with the decision of the Court of Appeals in the instant case. We believe the holding in *Goldshell* is in harmony with the decision of the Court in the case at bar.

The *Goldshell* decision in the opinion on rehearing reported at 224 F.2d 86 merely holds that maintenance of steerageway is not an excuse for excessive or "immoderate" speed, the decision is otherwise distinguishable on its facts.

In the first opinion in Goldshell (reported at 222 F.2d 75) it is apparent that the two vessels met in New York's North River, a body of water entirely different from that of the Mobile Ship Channel at the point in question. It further appears that the North River has been held by the Second Circuit *not* to be a narrow channel within the meaning of Article 25, Inland Rules,

33 U.S.C.A. 210.[25] Therefore, there was no requirement under the circumstances in Goldshell that vessels each keep on their own right hand side of the channel. The reason for this is that there were many piers in the North River which extended into the river and there was so much "cross traffic" that the requirements of a narrow channel did not apply. This, of course, is entirely different from the situation in the narrow dredged Mobile Ship Channel which is bordered by spoil banks and in which there is absolutely no "cross traffic".

Furthermore, the collision in Goldshell, supra, was more of a crossing situation rather than a situation involving a meeting or passing situation. The White Plains was "showing her green light" and the Goldhell was "showing her red light".

Thus, no narrow channel rule was in effect, no radio contact was had, no radar ascertainment of position was made, and, thus, the speed of the vessels and the failure to stop engines of both vessels were solely determinative of fault because they were in that case, the only proven and existing "circumstances of the case" under Article 16.

Under circumstances of closer similarity to the instant case, the Second Circuit, has made it quite clear that there is no conflict between it and the Fifth Circuit regarding the application of Article 16. In *Polarus Steamship Company vs. The T. S. Sandjeford*, 236 F.2d

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[25]The Islander, 152 F. 385 (2d Cir. 1907); The Goldshell-White Plains, supra.

270 (2d Cir. 1956) the Second Circuit affirmed the District Court finding of moderate speed where the vessel's full speed was 12 knots and she was proceeding at 6 knots through the water when the other vessel was guilty of misuse of its radar and was "*merely guessing that the Polarus was steering a course parallell with the coast line*" and thereby imposed sole fault on one of the vessels. In this connection the court said:

> "Moderate speed is undoubtedly less than full speed ... but the term is a relative one and *precisely how much less the statute requires depends on the peculiar circumstances of each case. The Pennsylvania*, 19 Wall. 125, 85 U.S. 125, 22 L.ed. 148; *The Bayonne*, 213 F.216 (2d Cir; *Quinette vs. Bisso*, (5th Cir.) 136 F. 825 ... *The State of Alabama*, supra ... true it is that there are statements that in congested waters, and at times elsewhere, anything more than bare steerageway in the presence of fog may be too much ... Even more frequently the applicable rule has been said to be that no vessel shall be operated in a fog at a speed which is so fast that she cannot stop within the distance her helmsman can see ahead ... *but these are not rules of thumb to be applied willy-nilly. They are but glosses upon the basic rule requiring operation at a moderate speed, and, like it they must be applied according to the particular circumstances of each case.*" (Emphasis supplied).

Thus, it is seen that the rule of both the Fifth and Second Circuits are the same and that the Second Cir-

cuit has even quoted the Fifth Circuit decision of *Quinette vs. Bisso*, supra, with approval.

In a narrow channel in the face of an oncoming vessel, maintenance of steerage is obviously a much more relevant circumstance under the provisions of Article 16 than it is in open water or in channels which are not "narrow" channels within the meaning of Article 25 (33 U.S.C.A. 210).

Thus, in *Afran Transport Co. v. The Bergechief* 274 F.2d 469 (2d Cir. 1960) the Second Circuit said that under Article 16 a vessel "in open water" is not entitled to maintain steerage.

Similarly, this court has said that speed should only be reduced to the "*lowest point consistent with good steerage way*" where the vessel is entering a harbor where she is "likely to meet vessels from at least a dozen points of the compass", i.e. New York harbor. *The Martello*, 153 U.S. 64, 38 L.ed 637 (1894). This is what the HESS VOYAGER did in the case at bar.

The physical characteristics of Mobile and its Ship Channel, show that at the point in question (Buoy 42) traffic can approach but from one direction, i.e. the north on an outward course of 182° true.

Thus, in cases involving navigation in narrow channels, rather than cases in "open water" where traffic is approaching from all angles, or where there is "cross traffic" the Courts have uniformly held as a matter of fact that steerage way should be maintained in fog. *Union Oil Co. vs. Tugboat San Jacinto*, supra, *The*

Standella, supra, *The Coast Banker*, supra, the Motor Ship *Hoyanger*, 265 F.Supp. 720 (W.D. Wash., 1967), *China Union Lines, Ltd. V.A.O. Anderson and Co.*, supra, *The Burgan-Bergechief*, supra, the *Martello*, supra; *Gertrude Parker, Inc. v Abrams*, supra.

Thus, in *The Hare* (1904) .P. 331 the British Court held that a ship proceeding down the ship channel at Manchester, England need not stop engines on hearing a fog signal on grounds that the position of the vessels ahead of her in the channel, which was presumably on the proper side of the canal, was ascertained under the rules. See also *White Stack Towing Corp. v. Bethelehem Steel Co.*, 279 F. 2d 419, 82 ALR 2d 757 (4th Cir. 1960).

It would seem inconceivable as a matter of common sense that any action which would have resulted in a more serious collision could be legally required.

(B) The decision in Burgan-Bergechief does not conflict with the case at bar.

Petitioner argues at page 10-11 of its brief that the decision of the Second Circuit in the Burgan-Bergechief, 274 F. 2d 469 (2d Cir. 1960) is in conflict with the case at bar. The court in the Bergechief, supra, made the natural statement in passing that "use of radar does not justify a failure to obey rules of navigation *generally applicable*." From this, Petitioner asserts that there is a conflict of law between the courts.

The instant case does not, in any respect whatever, hold that the use of radar justifies a failure to obey the rules of navigation generally applicable. On the contrary, the most that can possibly be claimed to emerge from the holding in the instant case is that a radar observation of a vessel known to be within the confines of a 400 foot channel and whose position has been confirmed and acknowledged by radio communication constitutes a sufficient "ascertainment" of the observed vessel's position.

The vessels involved in the Bergan-Bergechief were navigating in the open sea off the coast of Maine. They were not confronted with the continuous and urgent problem of maintaining position within the confines of an extremely narrow channel. The vessels were not even subject to the requirements of Article 25 of the Inland Rules. The specific holding of the Second Circuit was that the failure to properly use radar when it was available constituted fault.

It is apparent from a comparison of the Bergechief decision and the decision of the case at bar, that the Bergechief simply confirms the holding of the Trial Court and the Court of Appeals in the instant case that a vessel may be condemned for improper use of radar.

As a matter of fact, the Bergechief, at least by inference, supports the view that steerageway should be maintained in *confined* waters. The Court stated: "In a dense fog as we have in this case *and in open water* a vessel is not entitled to maintain steerageway * * *" (Emphasis added.)

The Court here has not held that the use of radar justified any violation of the Rules of the Road but has held only that speed was moderate and any loss of steerageway by stopping of engines or otherwise would have created a more certain and serious collision than actually occurred. Finally, the Court here has held that the HESS VOYAGER was aground at the moment of collision and that the CHARLES LYKES would have collided with her even if she had been dead in the water which disposes of the Petitioner's argument by showing that, as a matter of fact, neither speed, nor failure to stop engines was a proximate cause of the collision.

SUMMARY AND CONCLUSION

It is submitted in summary that the decision of the District Court was eminently correct and not clearly erroneous. It cannot be doubted and indeed it has been admitted that the CHARLES LYKES was guilty of gross and flagrant fault (1) for leaving the port, (2) blocking her radar scanner, (3) navigating on the wrong side of the channel, (4) for excessive speed, (5) for failing to make known by radio to the HESS VOYAGER her radar blindness which resulted from the negligent act of leaving her booms rigged because she intended to load cargo early the next morning and (6) for advising the HESS VOYAGER that she was moving over when she was actually mislead by her own radar from doing so.

Under the circumstances, we submit that the collision was foredoomed from the time the CHARLES LYKES missed and overran buoy number 44.

The pilot of the CHARLES LYKES testified at trial that he had made up his mind to anchor, but not until after he had met and passed the HESS VOYAGER. In the totally blind condition of the CHARLES LYKES it is submitted that the CHARLES LYKES had no chance at all of regaining its side of the channel or of otherwise avoiding the collision unless warning of its predicament was given to the HESS VOYAGER by radio, whistle signal or otherwise, neither of which was done. Quite the contrary, the CHARLES LYKES, strangely enough, completely refused to own up to the fact that it was lost in the mouth of the river in heavy fog with its booms blocking its radar while proceeding down stream at a speed of 10 1/2 knots (or 6 knots in the opinion of its pilot). Indeed, it contented itself with merely advising the HESS VOYAGER that it would move over, and thus to the bitter end invited the intended port to port passing. Misleading radio conversations in this respect have been the comment of another court under strikingly similar circumstances. In *Pennsylvania Railroad Company vs. SS* MARIE LEONHARDT, 320 F. 2d 262 (3rd Cir. 1963) the court, in speaking of a misleading radio conversation from a bridge tender to an approaching vessel held:

> "It was by this means that this advance method of communication (radio) that the power operator gave information to the vessel. *Part of that information was misleading* ... at no time after the passage of the train over the drawspan did either of the bridge employees give the vessel any indication ... of further delay in the opening of the draw. *If the draw*

was not ready to open at that time, the bridge should have informed the vessel of that fact, either by radio, phone or by an appropriate horn or whistle signal. The District Court did not err in finding that the bridge was at fault was the cause of the collision." (Emphasis supplied).

Under the circumstances recited above, we submit that the behavior of the CHARLES LYKES could not be "reasonably or logically" anticipated or foreseen; *the VICTORY and the PLYMOTHIAN*, supra.

The conduct of the HESS VOYAGER in proceeding at slow speed to maintain steerage hard by the east bank and in completely vacating the channel when collision became apparent to it, so as to run hard aground on the east bank outside of the buoy line was entirely proper and justified. As the pilots felt and the lower courts held, the failure to stop engines probably avoided a more serious collision than that which occurred. *The Standella*, supra.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Theodore K. Jackson, a member of the bar of this Court, hereby certify that three copies of the above and foregoing brief have been served on Petitioner's Counsel of Record, Benjamin W. Yancey, Esquire, by depositing same in the United States mail, postage prepaid, addressed to him at his office in New Orleans, Louisiana on this day of August, 1970.

THEODORE K. JACKSON

October Term 1970 - No. 86

versus

Respondents.